

Supreme Court, U. S.
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MICHAEL ROBAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-316

DANIEL RAMIREZ URIARTE,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

Michael J. McCabe

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

DANIEL RAMIREZ-URIARTE,
PETITIONER,
vs.
UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Daniel Ramirez-Uriarte, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered March 2, 1978.

OPINION BELOW

The Court of Appeals entered its opinion and judgment on March 2, 1978. A copy of the opinion is attached and marked as Appendix "A".

JURISDICTION

On March 2, 1978, the Court of Appeals entered judgment affirming the criminal conviction of Petitioner for conspiracy to illegally import a controlled substance, marijuana, and conspiracy to possess a controlled substance with intent to distribute. The jurisdiction of this court is invoked under Title 28 U.S.C., §1254(1).

QUESTIONS PRESENTED FOR REVIEW

Whether the failure of the trial judge to instruct the jury on elements of the offense as charged constituted plain error requiring reversal of the conviction.

STATUTORY PROVISIONS INVOLVED

Title 21, United States Code, Section 841(a)(1):

- (a) Except as authorized by this subchapter, it shall be unlawful for any person - knowingly or intentionally -
 - (1) to manufacture, distribute or dispense or pos-

sess with intent to
manufacture, distri-
bute or dispense a con-
trolled substance;

Title 21, United States Code, Section

846:

(a) Any person who attempts or con-
spires to commit any offense de-
fined in this subchapter is
punishable by imprisonment or
fine or both which may not
exceed the maximum punishment
prescribed for the offense,
the commission of which was the
object of the attempt or con-
spiracy.

Title 21, United States Code, Section

952:

(a) It shall be unlawful to import
into the customs territory of
the United States from any place
outside thereof (but within the

United States) or to import into the United States from anyplace outside thereof, any controlled substance in Schedule 1. . . of subchapter 1 of this chapter.

Title 21, United States Code, Section

)
960:

(a) Any person who -

(1) Contrary to Section
952. . . of this title
knowingly, or intention-
ally imports or ex-
ports controlled sub-
stances, . . . shall be
punished as provided in
subsection (b) of this
section.

(b) (1) In the case of a viola-
tion under subsection (a)
of this section with re-
spect to a narcotic drug
in schedule 1 or 2, the per-

son committing such violation shall be imprisoned not more than 15 years, or fined not more than \$25,000 or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term, not less than three years, in addition to such term of imprisonment. . .

Title 21, United States Code, Section

963:

(a) Any person who attempts to conspire to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed by the offense, the commission of which was the object of the attempt or conspiracy.

Title 18 Federal Rules of Criminal Procedure, Rule 14:

(a) If it appears that a defendant or the government is prejudiced by a joinder of offense or of defendants in an indictment or an information or by such joinder for trial together, the court may order an election or separate trial of counts, grant a severance of defendants, or provide whatever other relief justice requires. . .

Title 28, United States Code, Federal Rules of Evidence, Rule 402:

(a) . . . evidence which is not relevant is not admissible.

Title 28, United States Code, Federal Rules of Evidence, Rule 403:

(a) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, con-

fusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Title 28, United States Code, Federal Rules of Evidence, Rule 404(b):

(a) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

STATEMENT OF RELEVANT FACTS

On November 29, 1976, Appellant was convicted of conspiracy to import a controlled

substance in violation of 21 U.S.C. §§952, 960, and 963, and conspiracy to possess a controlled substance in violation of 21 U.S.C., §§941(a)(1) and 846. Though the charge to the jury repeatedly referred to the terms, "knowingly", "willfully", "importation", and "possession", and through these terms constituted elements of the offenses charged, the trial judge failed to instruct the jury as to the meanings and legal consequences of these terms.

REASONS FOR GRANTING THE WRIT

THE FAILURE OF THE TRIAL JUDGE TO INSTRUCT THE JURY ON THE MEANING AND LEGAL CONSEQUENCES OF "KNOWINGLY", "WILLFULLY", "IMPORTATION", AND "POSSESSION", SAID TERMS BEING ELEMENTS OF THE OFFENSES CHARGED, CONSTITUTES PLAIN ERROR REQUIRING REVERSALE. RECTIFICATION OF THIS ERROR IS REQUIRED IN AN IMPORTANT AND FAR-REACHING AREA OF THE LAW.

It is fundamental that the jury must be instructed as to the elements of the crimes charged. Such instructions must be given whether requested or not. United States v. Musgrave, 444

F.2d 755, 764 (5th Cir. 1971), appeal after remand, 483 F.2d 327, cert. denied, 414 U.S. 1023. United States v. DeMarco, 488 F.2d 828, 832 (2nd Cir. 1973); United States v. Small, 472 F.2d 818, 819-20 (3rd Cir. 1971); United States v. Gaither, 440 F.2d 262 (D.C. Cir. 1971); United States v. Rybicki, 403 F.2d 599 (6th Cir. 1968). Failure to instruct the jury on the elements of the conspiracy charged, by defining and specifying the elements, constitutes plain error substantially affecting Appellant's rights and requires reversal notwithstanding the defense counsel's participation or acquiescence. United States vs. Bosch, 505 F.2d 78, 81-82 (5th Cir. 1974); cf. United States v. King, 521 F.2d 61, 63 (10th Cir. 1975).

In order to convict for participation in a conspiracy the jury must find: (1) that the object of the conspiracy, here importation and possession, constituted a substantive offense; (2) that the conspiracy was willfully formed; (3) that the defendant willfully became a member

of the conspiracy; (4) that in agreeing to conspire the defendant knew or should have known that the object of the Agreement was unlawful; and (5) that thereafter one or more co-conspirators knowingly acted in furtherance of the agreement. United States v. Thompson, 533 F.2d 1006, 1009 (6th Cir. 1976); United States v. Bradley, 455 F.2d 1187 (1st Cir. 1972), aff'd, 410 U.S. 605.

In the instant case, the terms, "knowingly" and "willfully" serve to characterize Appellant's intent. Where, as here, intent is an element of the offense charged, its existence is a question of fact to be submitted to the jury. The jury must be charged fully and adequately.^{1/} Morissette v. United States, 342 U.S. 246, 274 (1952); cf., United States v.

^{1/} Note that at least one case held that it was the possibility of substantial prejudice from an omission of an adequate intent instruction that required reversal. United States v. Bryant, 461 F.2d 912 (6th Cir. 1972).

Tyler, 505 F.2d 1329 (5th Cir. 1975) (conspiracy to possess with intent to distribute a controlled substance); United States v. Musgrave, supra.

Knowledge of illegal importation is an essential element that must be proven to establish guilt of conspiring to illegally import a controlled substance. United States v. Nathan, 476 F.2d 456, 458-59 (2nd Cir. 1973), cert. denied, 414 U.S. 823. The jury must be properly instructed as to the defendant's knowledge, whether or not such instruction was requested by defense counsel. United States v. DeMarco, supra; United States v. Haywood, 452 F.2d, 1330, 1332 (D.C. Cir. 1971); United States v. Weiler, 458 F.2d 474, 476 (3rd Cir. 1972).

Similarly, where, as here, willfullness is an element of the offense charged, failure of the Court to adequately explain its meaning constitutes plain error, even though not objected to at trial. Screws v. United States, 325 U.S. 91 (1945); United States v. Thomas, 459 F.2d

1172, 1176-77 (D.C. Cir. 1972); United States v. Krosky, 418 F.2d 65, 67-68 (6th Cir. 1969). See also, United States v. Sirhan, 504 F.2d 818, 820 n. 3 (9th Cir. 1974): "If the statute requires a willful intent for conviction, then an instruction on willfullness must be given. . . ." Id., 820, n. 3.

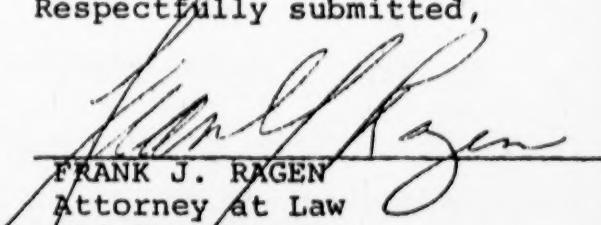
As stated above, to convict on a conspiracy charge, the jury must also find that the objects of the conspiracy, importation and possession, constitute a substantive offense. United States v. Bradley, supra. It is clear, then, that at the very least, the elements of importation and possession must be defined and their legal consequences explained. Otherwise, the basis of the jury's findings would be a matter of mere speculation.

CONCLUSION

For these reasons, the Petitioner, Daniel Ramirez-Uriarte, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

DATED: May 26, 1978


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Attorney for Petitioner

DECLARATION OF SERVICE BY MAIL

I, the undersigned say: I am over 18 years of age, employed in the County of San Diego, California, in which County the within-mentioned mailing occurred, and not a party to the action. My business address is 108 Ivy Street, San Diego, California.

On May , 1978, I deposited in the U.S. Mail, at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of PETITION FOR WRIT OF CERTIORARI FOR DANIEL RAMIREZ URIARTE, Petitioner, to the following:

Solicitor General of the United States
Honorable Wade McCree
Department of Justice
Washington, D.C. 20430

I declare under the penalty of perjury that the foregoing is true and correct. Executed on this 30th day of May, 1978, at San Diego, California.


JULIE A. CALLEJA

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
)
 Plaintiff-Appellee,)
)
 vs.) No. 77-1117
)
 JOSE F. URIARTE,)
)
 Defendant-Appellant.)
 _____)

UNITED STATES OF AMERICA,)
)
 Plaintiff-Appellee,)
)
 vs.) No. 77-1145
)
 DANIEL RAMIREZ-URIATE,)
)
 Defendant-Appellant.)
 _____)

Appeal From the United States District Court
For the Southern District of California

Before: MERRILL and TRASK, Circuit Judges, and
JAMESON, *District Judge

TRASK, Circuit Judge:

* Honorable William J. Jameson, United States Senior
District Judge, for the District of Montana,
sitting by designation.

Appellants Daniel Ramirez-Uriarte (herein Ramirez) and Jose F. Uriarte (herein Uriarte) appeal from their jury convictions for conspiracy to import marijuana (21 U.S.C. §§952, 960 and 963), and conspiracy to possess marijuana with intent to distribute (21 U.S.C. §§841(a)(1) and 846).

The alleged conspiracy involved multiple incidents of border crossings with car and truck loads of marijuana. The government's chief witness was one of the co-conspirators, Arthur LaSalle. LaSalle told the Court the details of the conspiracy as it functioned in late 1975 and early 1976. At the instruction of either appellants or a co-conspirator Eliseo, LaSalle would go to Mexico and drive marijuana laden vehicles to California.

I.

Ramirez complains that the trial court impermissibly admitted evidence concerning his previous March 1972 arrest for possession of 301 kilos of marijuana. The government sought

to introduce this evidence on alternative theories that it was admissible as a prior similar act, or, it might be deemed part and parcel of the conspiracies alleged. Ramirez argues that this evidence was not relevant and was highly prejudicial. He further claims that the trial court did not properly balance this evidence's probative value against the potential prejudice.

The 1972 arrest was admissible and relevant on at least two theories: First, it was evidence of the conspiracy charged. The indictment in this case set no starting date for the conspiracy. The 1972 arrest was for transporting large quantities of marijuana in a car. The indictment charged Ramirez with conspiring to transport marijuana in cars and trucks. This makes the evidence of the 1972 arrest relevant to show both material facts relating to the conspiracy and that the conspiracy was continuing along the same lines. United States v. Bonanno, 467 F.2d 14 (9th Cir. 1972), cert. denied, 410 U.S. 909 (1973). Second, this

evidence is admissible as proof of a plan or scheme, or to show modus operandi under Fed.R. Evid. 404(b). See, e.g., United States v. Brashier, 548 F.2d 1315, 1325-26 (9th Cir. 1976).

Considering the high probative value of this evidence, the testimony concerning the 1972 arrest was properly admissible.

II.

Ramirez also argues that rebuttal evidence given in connection with testimony on the 1972 arrest was error. No objection was made to this testimony at trial. Accordingly, absent plan error, there can be no reversal. Marshall v. United States, 409 F.2d 925 (9th Cir. 1969). There was no plain error, and Ramirez had not shown any abuse of discretion in the trial judge admitting this evidence. United States v. Perez, 491 F.2d 167, 173 (9th Cir.), cert. denied, 419 U.S. 858 (1974).

III.

Appellant Uriarte complains that evidence of Ramirez's 1972 arrest created improper inference prejudicial to him. No testimony linked

Uriarte to this 1972 incident. Based on the prejudicial nature of this evidence, Uriarte moves for severance, but it was denied. The test for when severance should be granted is found in United States v. Brashier, 548 F.2d 1315, 1323 (9th Cir. 1976):

The test is whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever. (citations omitted)

Similar cases have arisen where members of the conspiracy who entered late, or were not involved in all aspects of the conspiracy, have been denied severance. This court has not found it impossible to try co-conspirators together, even when not all of the evidence admitted applied to each co-conspirator.

United States v. Murray, 492 F.2d 178, (9th Cir. 1973), cert. denied, 419 U.S. 854 (1974); see United States v. Witt, 215 F.2d 580 (2nd Cir.), cert. denied, 348 U.S. 887 (1954).

As a safeguard, Uriarte was given a limiting instruction regarding the 1972 arrest. With this instruction, it is hard to see how Uriarte was unduly prejudiced by the joint trial. The trial court properly denied the motion for severance.

IV.

Uriarte also argues that the government's chief witness, Arthur LaSalle, impermissibly testified about other criminal activity in which Uriarte was involved.

During his testimony, LaSalle related to the jury how he became involved with the smuggling conspiracy. He said that in 1975 he was approached by Uriarte and asked if he wanted to help smuggle illegal aliens into the United States. LaSalle further stated that after these runs, he started transporting marijuana for Uriarte and Ramirez.

Uriarte claims this evidence could only have been admitted to show his criminal disposition and that is impermissible under Fed.

F.Evid. 404(b). Appellant overemphasizes the importance of this evidence. It was relevant for other matters. Evidence relevant to the existence and aims of the conspiracy is admissible. United States v. Testa, 548 F.2d 847, 851 (9th Cir. 1977); United States v. Murray, supra, 492 F.2d at 190.

For the first time on appeal, Ramirez objects that the jury instructions were fundamentally in error because they did not adequately explain the elements of the crime. Rule 30 of the Federal Rules of Criminal Procedure precludes review regarding jury instructions if there was no objection below and no plain error is apparent. A review of the instructions reveals no plain error. The jury was properly instructed.

The judgment below is affirmed as to both appellants.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

DANIEL RAMIREZ-URIARTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530



In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-316

DANIEL RAMIREZ-URIARTE, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

Petitioner contends that the jury was inadequately instructed as to the elements of the offenses.

After a jury trial in the United States District Court for the Southern District of California, petitioner and co-defendant Jose Uriarte were convicted of conspiracy to import marijuana, in violation of 21 U.S.C. 960 and 963 (Count 1), and of conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846 (Count 2). Petitioner was sentenced to concurrent terms of five years' imprisonment on Count 1 and two years' imprisonment on Count 2, subject to the parole eligibility provisions of 18 U.S.C. 4205(b)(2). He was also sentenced to a special parole term of 15 years. The court of appeals affirmed (Pet. App.).

1. The evidence at trial showed that, sometime during September or October 1975, Arthur LaSalle, an unindicted co-conspirator, was asked by petitioner's co-defendant, Jose Uriarte, to drive a truck loaded with marijuana from Mexico to petitioner's residence in San Diego (Tr. 171-173, 179, 316-317). LaSalle did so and was paid \$1,800 by Uriarte, who took delivery of the truck and its contents on the street near petitioner's house (Tr. 187-188). LaSalle transported truckloads of marijuana from Mexico on seven subsequent occasions between October 1975 and March 1976. On four of those occasions LaSalle delivered the trucks to petitioner at his residence (Tr. 198-199, 203-205, 208), and petitioner paid LaSalle between \$1,000 and \$2,500 for three of these deliveries (Tr. 199, 203, 208).¹

2. Petitioner asserts (Pet. 8-12) that the trial court's instructions to the jury did not adequately describe the elements of the conspiracies charged because they did not define the terms "knowingly," "willfully," "importation," and "possession."² Since petitioner did not object to these instructions at trial, his claims do not warrant reversal of his conviction in the absence of plain error. Fed. R. Crim. P. 30, 52(b). As the court of appeals held, however, the jury was properly instructed in this case (Pet. App. 7).

The trial court instructed the jury that the essential elements of the conspiracy charged were as follows (Tr. 867):

¹After the third trip, LaSalle had been told by petitioner and another co-conspirator to cease making trips for Uriarte because Uriarte and his son had lost a truck carrying marijuana (Tr. 202-203). LaSalle made no further trips arranged or paid for by Uriarte.

²This argument is also raised by co-defendant Jose Uriarte, whose petition for a writ of certiorari is pending (No. 77-6916).

Three essential elements are required to be proved in order to establish the offense of conspiracy charged in the indictment.

First, that the conspiracy described in the indictment was willfully formed and was existing at or about the time aleged.

Second, that the accused willfully became a member of the conspiracy.

And third, that one of the conspirators thereafter knowingly committed an overt act charged in the indictment in furtherance of some object or purpose of the conspiracy at or about the time and place alleged.

An overt act is any act knowingly committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. It need not be criminal in nature if considered separate and apart from the conspiracy.

The jury was also instructed that one who acts in furtherance of a conspiracy must have knowledge of the scheme in order to be a co-conspirator (Tr. 868), that one becomes a willful participant if he understands the unlawful character of the plan and knowingly encourages or assists the scheme (Tr. 869), and that proof of specific intent is required in order to convict (Tr. 871). As to specific intent, the jury was instructed that "the government must prove that the defendant knowingly did an act which the law forbids purposely intending to violate the law" (Tr. 871).

Petitioner does not and could not successfully challenge the correctness of these specific instructions. See *United States v. Thompson*, 533 F. 2d 1006, 1009 (6th Cir.), cert.

denied, 429 U.S. 939 (1976); *Bradford v. United States*, 413 F. 2d 467, 470 (5th Cir. 1969); 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* §27.08 (3d ed. 1977). He claims only that the instructions should have been amplified. In the context of this case, however, any juror of ordinary intelligence would have understood the instructions to require him to find that petitioner knew that the object of the conspiracy was to knowingly import and intentionally possess marijuana with intent to distribute.³ Moreover, two counts of the indictment—which was read to the jury twice (Tr. 55-57, 865-866)—specified that the object of the conspiracy was to “knowingly and intentionally import” and “knowingly and intentionally possess with intent to distribute” marijuana. Viewed in the context of the entire trial, *United States v. Park*, 421 U.S. 658, 674-675 (1975), the instructions to the jury adequately set forth the intent element of the offenses. See *United States v. Reyes-Padron*, 538 F. 2d 33, 35 (2d Cir. 1976), cert. denied, 429 U.S. 1046 (1977); *United States v. Papa*, 533 F. 2d 815, 825 (2d Cir.), cert. denied, 429 U.S. 961 (1976).⁴

³Petitioner's reliance (Pet. 9-11) on cases such as *Morissette v. United States*, 342 U.S. 246, 274 (1952), and *United States v. DeMarco*, 488 F. 2d 828, 832 (2d Cir. 1973), is misplaced. Those cases concern a total omission of an instruction on scienter. Nor is *Screws v. United States*, 325 U.S. 91 (1945), upon which petitioner relies (Pet. 11), apposite. There the jury instructions included a fundamentally incorrect standard of willfulness.

⁴Petitioner's claim that the terms “importation” and “possession” should have been further defined in the jury instructions is without merit. Those terms are commonly understood and the jury could not have misapprehended their meaning.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1978